Scotland and the EU: Comment by PIET EECKHOUT

Piet Eeckhout 2014-09-09T08:00:54

It has been a great pleasure to read Sionaidh Douglas-Scott's marvellous analysis of why the EU should welcome an independent Scotland. I have to admit that I agree with about everything that she says, which for purposes of this symposium is not the most exciting starting-point. But overall there is disagreement of course, including with such luminaries as Commission President Barroso and Professors Crawford and Boyle. My comments here focus on three points – constitutional, doctrinal, and practical.

This symposium is, appropriately, posted on *Verfassungsblog*. As Sionaidh rightly points out, the question of an independent Scotland's relationship with the EU must surely be approached from an EU law perspective. This does not exclude the relevance of public international law. The EU respects international law, and the founding Treaties are international legal acts. What this means, in a nutshell, is that both EU law and international law must be complied with. But international law is flexible as regards questions of State succession, and the primary focus should be on what EU law has to say on the matter. Now, whatever the merits of this 50 years old legal evolution, EU law clearly conceives of itself as a form of constitutional law, grafted upon its international law foundations. It is a *sui generis* type of constitutional law, which as Sionaidh emphasizes does not just revolve around traditional State sovereignty, but includes the direct conferral of individual rights. Her analysis is excellent, but can be taken even further. In *Van Gend en Loos* the Court of Justice not only established that the EU Treaties confer rights on individuals; it established that the *subjects* of this new legal order comprise not only Member States but also their nationals. EU citizens have equal "ownership" of this constitutional order as the Member States. This mixed ownership permeates the Lisbon Treaty, including its dual concept of representative democracy (Art 10 EU).

Of course the default legal position seems to be that, upon independence, the EU Treaties simply no longer apply to Scotland, as it is no longer part of the United Kingdom. But imagine a Polish plumber who has set up shop in Scotland some years ago, whose business is flourishing, and who finds himself, from one day to the next, bereft of all his EU law rights, his life and work plunged in a state of great uncertainty. To make matters worse, the new Scotland is actually on his side, as it seeks to continue membership. He would lose his rights, purely as a result of the EU (meaning the EU institutions and Member States) refusing to arrange for Scotland's continued membership. To me this would be a clear and grave breach of EU constitutional law.

The doctrinal point concerns Art 50 TEU on withdrawal from the EU. This provision, to which Sionaidh rightly draws attention, has a clear implication for Scottish independence: that there needs to be a negotiation. Such independence is, in

effect, equivalent to a partial withdrawal by the United Kingdom from the EU, if the independence is left to its own devices and Scottish continued membership is not accepted (the default position). The Art 50 requirement of negotiations is clearly inspired by the need to ensure a smooth transition in the event of a Member State's withdrawal. At the Convention on the Future of Europe there were actually three proposals, which Tatham characterises as State primacy (no conditions), federal primacy (prohibition on withdrawal) and federal control (withdrawal as a mutually negotiated activity – see Biondi Eeckhout and Ripley, *EU Law after Lisbon* at 147-148). It is the latter approach which was accepted, and which confirms the EU's practice of seeking negotiated solutions to membership questions (accessions, Algeria, Greenland, German reunification).

These negotiations will need to start as soon as future independence is definite. Given that Scotland is already in the EU, it surely complies with the conditions for membership. Whether the amendment procedure of Art 48 TEU needs to be followed or the accession process of Art 49 is open to debate. The disadvantage of the former is that a Convention would need to be set up, followed by a Conference of Member State representatives. That seems rather unnecessary for a mere continuation of membership. It seems to me that a slightly creative reading of Art 49 would enable to soon-to-be independent Scottish State to make a membership application.

My practical point is that surely there would be a negotiation in the real EU world. A mere Scottish referendum, endorsed by Westminster, does not automatically create an independent Scotland which the EU recognizes as such. Even if only one current Member State refuses to recognize the new Scotland, that Member State may continue to demand that the United Kingdom ensure that EU law be respected in Scotland. It seems rather clear that there will be *more* than one Member State government which will want to see the nature of their country's future relations with the new Scotland, prior to recognition. Think only of the trade side of things. If Scotland effectively leaves the EU, it is no longer part of the internal market and of the EU customs union. It could charge customs duties on EU imports. There would need to be a customs border between Scotland and the rUK. The EU would need to subject imports from Scotland to its MFN tariffs. Scotland's WTO status would be uncertain. Indeed, non-EU countries, particularly those that have trade agreements with the EU, will also want to know what's going to happen to their trade with Scotland. The EU itself may incur international responsibility if it accepts Scottish independence without ensuring that Scotland respects the terms of trade agreed with non-member countries.

So negotiations there will need to be.
